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# CIVIL AND POLITICAL RIGHTS, INCLUDING QUESTIONS OF INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, IMPUNITY

## Report of the Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, submitted in accordance with Commission resolution 2000/42

## Addendum

## Mission to South Africa*

*The executive summary of this mission report is being circulated in all official languages. The report itself is contained in the annex to the executive summary and is being circulated in the language of submission only.

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**Executive summary**

The present report concerns a fact-finding mission to South Africa undertaken from 7 to 13 May 2000 by the Special Rapporteur on the independence of judges and lawyers, pursuant to the mandate contained in Commission on Human Rights resolution 1994/41, as renewed for a further three years by resolution 2000/42.

The issues examined by the Special Rapporteur can be summarized as follows:

(a) Independence of magistrates;

(b) Proposed complaints mechanism for judges;

(c) A unified judiciary;

(d) Minimum sentence legislation and its impact on judicial independence;

(e) The appointment of acting judges and whether that impacts on the independence of the court;

(f) The position of public prosecutors and the extent of their independence;

(g) An integrated legal profession;

(h) Legal aid and access to justice;

(i) Judicial training and continued legal education.

During the course of his mission the Special Rapporteur met with the Minister of Justice, the then Chief Justice of the Supreme Court of Appeal, Ismail Mahomed (who regretfully passed away on 17 June 2000), the acting Chief Justice, judge presidents and judges of the High Court and Supreme Court of Appeal, the President and judges of the Constitutional Court, regional court presidents, chief magistrates, and magistrates of various courts. The Special Rapporteur also had consultations with the Chief Director of Justice College, the co-Chairperson of the Law Society of South Africa, the Chairperson of the General Council of the Bar of South Africa, a director of the National Prosecuting Authority, the Chairperson of the Parliamentary Portfolio Committee on Justice, the Chairperson of the Legal Aid Board, various members of the Judicial Service Commission, the Chairperson of the Magistrates' Commission, the Director of the Office of the Public Defender, the Chairperson and a commissioner of the South African Human Rights Commission, various persons in the administration of justice, and lawyers who represented applicants in a suit concerning the independence of magistrates.

South Africa is currently going through a phase of massive transformation. A country devastated by the most heinous injustices of the past is attempting to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights" (preamble to the Constitution).

In this process the justice system will inevitably be the focus of attention. The Constitution expressly provides for an independent judiciary, which includes the lower courts and the superior courts. Transforming the mindsets of judges, magistrates, lawyers and prosecutors who, until 1994, functioned under a regime of parliamentary supremacy, to accept the supremacy of the Constitution is no small task.

The Special Rapporteur generally welcomes the openness and transparency of the Government in calling for dialogues with the relevant actors on its proposal for reforms.

**Independence of magistrates and a unified judiciary**

In South Africa, 90 per cent of criminal cases are handled by magistrates at the district court and regional court level. Because of their past status under apartheid rule, their current conditions of service and their responsibilities for administrative duties, magistrates are not perceived to be independent, though there is no evidence of any interference in their adjudicative tasks. It is important that they be integrated into the culture of judicial independence and appropriate measures to change the general perception of the lack of independence of magistrates will have to be adopted in the context of the proposal for a unified judiciary. The Government's proposal to merge the Judicial Service Commission with the Magistrates' Commission should also be addressed in this context.

A committee composed of representatives of all actors in the administration of justice should be formed to address the proposal for a unified judiciary. The committee should include representatives of magistrates, judges, prosecutors, lawyers and academia, as well as representatives of the Department of Justice.

In the interim, measures must be taken to facilitate interaction between judges and magistrates on an informal level. The bar associations could encourage this by organizing periodic law conferences and seminars in which judges, magistrates and lawyers would be invited to participate. There should be no objection to participation by the Department of Justice and prosecutors, whose presence and participation will not in any way impinge on the independence of the judiciary.

**Proposed mechanisms for complaints against judges**

The Special Rapporteur welcomes the initiative of the Judicial Service Commission and judges to draft legislation for the establishment of a mechanism to deal with complaints against judges. The composition of this mechanism should be left entirely to the judges and if necessary retired judges could be included. Judges, who took the initiative to draft legislation for such a mechanism, should be entrusted to self-regulate the mechanism for an initial period of at least seven years. Thereafter the effectiveness of the mechanism could be reviewed.

The Special Rapporteur also welcomes the initiative of the late Chief Justice Ismail Mahomed for the production and publication of a Code of Judicial Ethics for judges. This is yet another step in the right direction towards securing greater accountability.

**Minimum sentencing legislation**

The minimum sentencing legislation in South Africa is not as regimented as that found in other jurisdictions, because the law allows the imposition of lesser sentences for "substantial and compelling circumstances". Nevertheless, such legislation does impinge upon international standards of judicial independence. It is beyond dispute that sentencing is part of the judicial process of a criminal trial. Minimum sentencing legislation may offend the fair trial provisions of article 14 of the International Covenant on Civil and Political Rights and principle 3 of the United Nations Basic Principles on the Independence of the Judiciary.

Rather than having an outside body setting guidelines for courts, it may be more appropriate for the apex court, in this case the Supreme Court, from time to time to deliver guideline judgements to assist lower courts in sentencing. Experiences with similar practices in the United Kingdom and recently in New South Wales, Australia, could be studied.

**Appointment of acting judges**

One of the essential elements of judicial independence is security of tenure. This is expressly provided for in principle 12 of the United Nations Basic Principles on the Independence of the Judiciary. Hence the appointment of acting judges under section 175 of the Constitution and allowing them to remain on the same appointment for periods beyond the purpose envisaged by the Constitution could adversely affect the independent character of tribunals, especially when these appointments are used as a form of "short probation".

The Judicial Service Commission, which is, inter alia, empowered to advise the Government on judicial matters, should review the appointments of acting judges and determine whether they are consistent with the spirit of section 175 of the Constitution and whether such acting judges could be perceived as independent in the light of international standards and experiences in other jurisdictions.

**The position of public prosecutors**

The preamble to the United Nations Guidelines on the Role of Prosecutors acknowledges, inter alia, that prosecutors play a crucial role in the administration of justice. It is essential to ensure that prosecutors possess the requisite professional qualifications to exercise their functions impartially in criminal proceedings. They also require an element of independence in exercising discretion on whether to prosecute. Prosecutors therefore need to be perceived as not being part of the civil service. Though in South Africa, prosecutors are separate from the civil service, their service conditions are the same as those of the civil service. Their terms and conditions of service should be reviewed and the establishment of a separate independent legal service commission to deal with all matters relating to their service is desirable.

The Office of the United Nations High Commissioner on Human Rights should cooperate with Justice College to identify areas for joint training programmes to improve the skills and competence of prosecutors.

**Legal aid and access to justice**

With regard to legal aid, the bar associations should initiate programmes to sensitize their members to the need for commitment to assist in legal aid programmes without regard to fees. Lawyers should be encouraged to undertake at least a minimum number of free legal aid cases a year as their contribution to this noble social cause in a country where poverty is still a hindrance to access to justice. This moral duty should be inculcated in teaching programmes for law students at university levels.

**Judicial training and continued legal education**

The attitude of some judges to continued legal education is a matter of concern. Appointment to the high office of judge does not mean that no further education is required of the incumbent in order to keep abreast of the latest developments in the law and procedure, particularly of developments in other jurisdictions. Resistance or resentment of such programmes on the grounds that they would impinge on the independence of the judiciary should not be accepted. Judicial skill and competence will only enhance public confidence in the independence of the judiciary. Judges should welcome the involvement of non-judges in such programmes on subjects where expertise is not readily available within the judiciary.

The Special Rapporteur recommends that the Government provide more resources, particularly financial resources, to Justice College to improve its training programmes. Continued legal education programmes for both magistrates and judges should be made compulsory.

**Annex**

# REPORT OF THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS ON HIS MISSION TO SOUTH AFRICA (7-13 MAY 2000)

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## Introduction

1. The present report concerns a fact-finding mission to South Africa undertaken from 7 to 13 May 2000 by the Special Rapporteur on the independence of judges and lawyers, pursuant to the mandate contained in Commission on Human Rights resolution 1994/41, as renewed by resolution 2000/42 extending the mandate for a further three years. This mandate calls upon the Special Rapporteur, inter alia, to inquire into any substantial allegations transmitted to him and report his conclusions thereon.

2. The Special Rapporteur has received, on several occasions, information concerning challenges to the judicial system in South Africa. The information relates to the independence of magistrates (the presiding officers in the lower courts) during the transition period from apartheid rule to a democratic government, proposals made by the Department of Justice for a unified judiciary and concerns about a proposed complaints mechanism for judges (the presiding officers in the superior courts/High Courts). The Special Rapporteur was also alerted to concerns about the independence of prosecutors.

3. In addition, South Africa represents an important case study for other countries going through a transition period and countries grappling with similar issues. It was necessary to undertake a fact-finding mission to South Africa to study the various new processes and experiments being tried by the country to improve the delivery of justice to the people. These processes, if successful, could be used as models for other countries. The South African approach of linking judicial independence with judicial accountability is interesting. Judicial independence has always been a focus of the international community and has been the basis of the mandate of the Special Rapporteur. What is now coming to the fore is the issue of judicial accountability. Therefore, what is happening in South Africa now is very important.

4. In the light of the above, the Special Rapporteur sought, by letter dated 26 May 1999, the consent of the Government of South Africa to undertake a visit to the country in order to inquire into the concerns raised and to study the various processes. The Government responded favourably to this request in a letter dated 6 August 1999, and facilitated the mission through the Department of Foreign Affairs and the Department of Justice in Pretoria. The mission was originally scheduled to take place from 22 to 26 November 1999, but had to be rescheduled for 7 to 13 May 2000. The Special Rapporteur expresses his gratitude to those persons and institutions responsible for his mission. The Office of the High Commissioner for Human Rights (OHCHR) in South Africa and the United Nations Development Programme (UNDP) also provided assistance.

5. The issues examined by the Special Rapporteur can be summarized as follows:

(a) Independence of magistrates;

(b) Proposed complaints mechanism for judges;

(c) A unified judiciary;

(d) Minimum sentence legislation and its impact on judicial independence;

(e) The appointment of acting judges and whether that impacts on the independence of the court;

(f) The position of public prosecutors and the extent of their independence;

(g) An integrated legal profession;

(h) Legal aid and access to justice;

(i) Judicial training and continued legal education.

6. During the course of his mission the Special Rapporteur met with the Minister of Justice, the then Chief Justice of the Supreme Court of Appeal, Ismail Mahomed (who passed away on 17 June 2000), the acting Chief Justice, judge presidents and judges of the High Court and Supreme Court of Appeal, the President and judges of the Constitutional Court, regional court presidents, chief magistrates, and magistrates of various courts. The Special Rapporteur also had consultations with the Chief Director of Justice College, the co-Chairperson of the Law Society of South Africa, the Chairperson of the General Council of the Bar of South Africa, a director of the National Prosecuting Authority, the Chairperson of the Parliamentary Portfolio Committee on Justice, the Chairperson of the Legal Aid Board, various members of the Judicial Service Commission, the Chairperson of the Magistrates Commission, the Director of the Office of the Public Defender, the Chairperson and a commissioner of the South African Human Rights Commission, various persons in the administration of justice, and lawyers who represented applicants in a suit concerning the independence of magistrates.

7. The Special Rapporteur also met with representatives of the following non-governmental organizations dealing with issues related to his mandate: National Institute for Public Interest Law and Research (NIPILAR), Lawyers for Human Rights (LHR), National Association of Democratic Lawyers (NADEL), the University of the Western Cape (UWC) Legal Aid Clinic, the Law Race and Gender Research Unit (LRGU), Legal Resources Centre (LRC), Black Lawyers Association (BLA), Centre for the Study of Violence and Reconciliation (CSVR) and Centre for Applied Legal Studies (CALS). In addition, the Special Rapporteur met with the UNDP acting resident coordinator as well as with representatives of the United Nations Office for Drug Control and Crime Prevention (UNODCCP) and the Office of the United Nations High Commissioner for Refugees (UNHCR).

8. The Special Rapporteur visited the cities of Pretoria, Johannesburg, Cape Town, Bloemfontein and Kimberley during the course of his mission.

9. After the mission the Special Rapporteur learnt of the death of Chief Justice Ismail Mahomed. The late Chief Justice, a South African patriot, was known throughout the Commonwealth and the rest of the world as a courageous, independent and learned judge. His passion for the pursuit of judicial excellence was seen in his lucid judgements. He truly personified judicial independence. The Special Rapporteur was privileged to have known him for many years. During the mission and despite his failing health the late Chief Justice called on the Special Rapporteur and discussed issues pertaining to the mission. His untimely death has robbed the legal fraternity and the people of South Africa of a magnificent judge.

## I. GENERAL BACKGROUND

10. South Africa's first democratic elections took place on 27 April 1994, in which the African National Congress (ANC) obtained a majority in the National Assembly and Nelson Mandela was elected as President. Its second democratic elections took place in May 1999, in which the ANC extended their majority and Thabo Mbeki was elected as the new President.

11. South Africa is in the process of a massive transformation. The State policy of apartheid, which in essence was legislated discrimination against black South Africans, affected all aspects of life. The country's transformation is geared towards undoing all the effects of apartheid, as well as the establishment and maintenance of more equitable policies in its place. It is apt to quote in full the preamble to the 1996 Constitution:

> *We, the people of South Africa,*
>
> *Recognise the injustices of our past;*
>
> *Honour those who suffered for justice and freedom in our land;*
>
> *Respect those who have worked to build and develop our country; and*
>
> *Believe that South Africa belongs to all who live in it, united in our diversity.*
>
> *We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -*
>
> > *Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;*
> >
> > *Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;*
> >
> > *Improve the quality of life of all citizens and free the potential of each person; and*
> >
> > *Build a united and democratic South Africa able to take its rightful place as a sovereign State in the family of nations.*

12. The Truth and Reconciliation Commission established pursuant to the Promotion of National Unity and Reconciliation Act held a special hearing on the legal community. All branches of the legal profession, including the judiciary and interested organs of civil society, were invited to make submissions on the role played by lawyers and judges between 1960 and 1994. The Truth and Reconciliation Commission stressed to those invited that,

> "It is not the purpose of the hearing to establish guilt or hold individuals responsible; the hearing will not be of a judicial or quasi-judicial nature. The hearing is an attempt to

> understand the role the legal system played in contributing to the violation and/or protection of human rights and to identify institutional changes required to prevent those abuses which occurred from happening again. We urge all judges both serving and retired to present their views as part of the process of moving forward."[1]

13. Many judges, including senior judges, did not appear before the Commission though they submitted their views in writing. The judges took the position that appearance in person before the Commission would be inconsistent with judicial independence.

14. The Commission, in its findings, deplored the position taken by the judges and expressed, inter alia, its deep regret. It stated that it could not understand how their appearance at the hearing, to give account and to answer questions, could undermine judicial independence. It added that the establishment of the Commission was a unique event "which would be unlikely to create some kind of a precedent" and that their appearance would have demonstrated accountability and would not have compromised the independence of the judiciary.

15. The findings of the Commission have once again brought into focus the tension between judicial independence and judicial accountability. In this regard the Special Rapporteur recalls that he advised the Commission against the issuance of subpeonas to compel the appearance of judges before the Commission. The Special Rapporteur reported on his advice to the Commission in his fourth annual report to the Commission on Human Rights (E/CN.4/1998/39, paras. 153-156).

16. The OHCHR office in South Africa was established in 1998 as part of a technical cooperation agreement signed by OHCHR and the Government in 1996. The project has a life span of two years and focuses on human rights institutional capacity-building. In particular, the project has been providing support to the Justice College, the South African Human Rights Commission, the Commission on the Restitution of Land Rights and the Human Rights Documentation Centre at the University of Fort Hare, in the former Transkei.

17. South Africa has ratified, inter alia, the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; and the Convention on the Elimination of All Forms of Discrimination against Women. It has signed the International Covenant on Economic, Social and Cultural Rights.

## II. TRANSFORMATION OF THE SYSTEM OF JUSTICE

18. The transformation of South African society from a system of apartheid to a democratic system, under a just rule of law, necessarily includes the transformation of the justice system. A change from supremacy of Parliament to constitutional supremacy requires a change in mindset to respond to the processes of change in the administration of justice. Professsor Shadrach Getto, the Deputy Director of the Centre for Applied Legal Studies of the University of Witwatersrand, described the scenario at a meeting with the Special Rapporteur as follows:

"We are dealing with certain inherited characteristics. It (the judiciary) served two societies in one country. It also has to do with the way in which it was structured; there was a High Court for the former black areas and a High Court for the former white areas. We did not have a judiciary which was centralized."

19. It is in this process of change that the tensions, suspicions and misunderstandings between the executive Government and the other actors in the administration of justice can be seen. Tensions, suspicions and misunderstanding are felt even among these other actors in the administration of justice. The public perception of the role of the judiciary takes place in this context.

20. Attacks on the judiciary through the media have been a source of concern in the legal fraternity. Soon after the mission the Special Rapporteur learnt that the President of the Constitutional Court and the Chief Justice, in a joint public statement in response to an allegation by an ANC representative that the judiciary was "totally biased", described as "deplorable" attacks on the institution of the judiciary. They stated, inter alia, "The judiciary has a critical part to play in enforcing the law, and in upholding the Constitution. It accepts the need for transformation mandated by the Constitution. Unjustifiable and unreasonable attacks on the integrity of the judiciary do not help that process. They undermine the constitutional role of the judiciary, erode confidence in its decisions, and damage it as an institution."[2]

## III. THE CONSTITUTION AND THE ADMINISTRATION OF JUSTICE

21. The Constitution of the Republic of South Africa is an impressive document that specifically provides for the separation of powers within a democratic State. Each branch of Government is also expressly provided for.

22. Chapter 2 of the Constitution contains the Bill of Rights which provides for most of the civil, political, economic, social and cultural rights contained in international human rights instruments.

23. The provisions relating to an independent judiciary and to the general administration of justice are detailed and encompassing. Chapter 8 of the Constitution is devoted to the courts and the administration of justice. The following are relevant provisions:

(a) Section 165 (2): "The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."

(b) Section 165 (3): "No person or organ of state may interfere with the functioning of the courts."

(c) Section 165 (4): "Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

(d) Section 165 (5): "An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

24. The judicial authority of South Africa is vested in the courts.[3] The courts are: the Constitutional Court; the Supreme Court of Appeal; the High Courts, including any high court of appeal that may be established by a statute; the Magistrates' Courts; and any other court established or recognized in terms of an Act, including any court of a similar status to either the High Courts' or the Magistrates' Courts.[4]

25. The Constitutional Court has its seat in Johannesburg. It is the highest court in all constitutional matters and it may decide only constitutional matters and issues connected with decisions on constitutional matters.[5] For the appointment of judges to the Constitutional Court the process is as follows. The Judicial Service Commission (JSC), after conducting public interviews, submits to the President of the Republic of South Africa ("the President") a list of nominees with three names more than the number of appointments to be made. The judges are then appointed by the President from the list.[6] The President and the Deputy President of the Constitutional Court are appointed by the President after consultation with the Judicial Service Commission and the leaders of parties represented in the National Assembly.[7] The other judges of the court are appointed by the President after consultation with the President of the Constitutional Court and the leaders of the parties represented in the National Assembly.

26. The Supreme Court of Appeal has its seat in Bloemfontein, some 500 km from Johannesburg. It is the highest court of appeal except in constitutional matters.[8] It consists of the Chief Justice and as many judges of appeal as the President may determine.[9]

27. The Chief Justice and the Deputy Chief Justice of the Supreme Court of Appeal are appointed by the President after consultation with the JSC, following a public interview process.[10] The other judges of the Supreme Court of Appeal are appointed by the President on the advice of the Judicial Service Commission after it has followed a public interviewing process.[11]

28. The High Court consists of several divisions.[12] The High Court is vested with an inherent jurisdiction and may decide any constitutional matter, except a matter that only the Constitutional Court may decide. A provincial division of the High Court consists of a judge president and as many judges as the President may determine.[13] The judges of the High Court are appointed by the President on the advice of the Judicial Service Commission.[14] Any appropriately qualified man or woman, who is a fit and proper person, may be appointed as a judicial officer. Such a person need not, except in the case of the Constitutional Court, be a South African citizen.[15] The Minister of Justice must appoint acting judges to the High Court after consulting the relevant judge president.[16]

29. The remuneration of judges is determined by legislation.[17] The current annual salaries of judges are: Chief Justice of the Supreme Court of Appeal and President of the Constitutional Court: R 458,877; Deputy Chief Justice and Deputy President of the Constitutional Court: R 451,515; judges of the Supreme Court of Appeal and Constitutional Court: R 429,657; Judge President of the High Court: R 427,026; Deputy Judge President of the High Court: R 420,156; and judges of the High Court: R 416,982.[18]

30. There are two levels of magistrates' courts: district courts and regional magistrates' courts. The district courts are grouped into 13 clusters, and at the head of each cluster is a

Chief Magistrate, except in the case of the Johannesburg cluster which, because of its size, is headed by a special grade of chief magistrate. The aim is to have a court manager in each cluster responsible for the administration of all the offices in the cluster, but owing to lack of financial resources it has not been able to implement this uniformly throughout the country. Regional magistrates' courts are arranged into eight groupings, each headed by a regional court president. The Magistrates Commission is in the process of geographically aligning the grouping of regional magistrates' courts with the cluster system for district courts.[19]

31. The district courts have criminal jurisdiction to hear all offences, except treason, murder and rape.[20] The regional magistrates' courts have criminal jurisdiction over all offences except treason.[21] The district courts may impose a sentence of imprisonment for a period not exceeding 12 months and may impose a fine not exceeding R 60,000.[22] Until recently, the regional magistrates' courts were able to impose a sentence of imprisonment for a period not exceeding 10 years and impose a fine not exceeding R 300,000.[23]

32. Since October 1998, the maximum sentence in a regional magistrates' court is 15 years' imprisonment. Currently, for cases under the Criminal Law Amendment Act No. 105 of 1997, the maximum regional court sentence is equivalent to the prescribed minimum sentence (except for life imprisonment, which is reserved for the High Court). The Criminal Law Amendment Act provides for increased jurisdiction for the regional courts.

33. Currently, magistrates' courts cannot inquire into, or rule on, the constitutionality of any legislation or any conduct of the President of the country.[24] The South African Law Commission has proposed that this jurisdiction be amended, whereby magistrates' courts will have a constitutional jurisdiction, but will not be able to rule on the constitutional validity of any Act of Parliament, any legislation passed by the legislature of a province after 27 April 1994, or any conduct of the President. The South African Law Commission further proposes that the Magistrates' Courts Act must be amended to make it clear that magistrates' courts shall be competent to rule on the constitutional validity, or validity for any other reason, of any administrative action, including executive action, and any statutory proclamation, regulation, order, by-law or other legislation; and any rule of the common law, customary law and customary international law.[25] These proposals are still to be considered by Parliament.

34. Magistrates are appointed by the Minister of Justice after consultation with the Magistrates Commission.[26] The Magistrates Commission has recently created nine provincial committees, which draw up a short list and interview candidates, and make recommendations to the Magistrates Commission. As this is a new system, it is not clear whether the Magistrates Commission simply forwards these recommendations as is, with no alterations, to the Minister of Justice for formal appointment.

35. The salaries of magistrates are determined by the Minister of Justice in consultation with the Magistrates Commission, after consultation with the Public Service Commission and with the concurrence of the Minister of Finance.[27] The current annual salaries of magistrates are: special grade chief magistrate: R 271,032; regional court president: R 271,032; chief magistrate: R 218,916; regional magistrate: R 218,916; and magistrate: R 179,304. [28] All other conditions of service of magistrates are determined by regulations issued by the Minister of Justice, based on recommendations by the Magistrates Commission.[29]

36. The Judicial Service Commission consists of:

(a) The Chief Justice, who presides at the meetings;

(b) The President of the Constitutional Court;

(c) One judge president designated by the judge presidents;

(d) The Minister of Justice or an alternate designated by him/her;

(e) Two practising advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President;

(f) Two practising attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President;

(g) One teacher of law designated by teachers of law at South African universities;

(h) Six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the National Assembly (these members only sit when the Judicial Service Commission considers the appointment of a judge);

(i) Four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces (these members only sit when the Judicial Service Commission considers the appointment of a judge);

(j) Four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly; and

(k) When considering matters specifically relating to a provincial or local division of the High Court, the Judge President of that division and the Premier, or an alternate designated by the Premier, of the province concerned.[30]

37. The Judicial Service Commission may advise the national Government on any matter relating to the judiciary or the administration of justice.[31]

38. The Magistrates Commission consists of:

(a) A High Court judge as Chairperson, designated by the President in consultation with the Chief Justice;

(b) The Minister of Justice or his or her nominee (currently the Director-General of the Department of Justice);

(c) Two regional magistrates, one to be designated by the regional magistrates and the other by the President after consultation with the regional magistrates;

(d) Two magistrates with the rank of chief magistrate, one to be designated by the chief magistrates and the other by the President after consultation with the chief magistrates;

(e) Two magistrates who do not hold the rank of regional or chief magistrate, one to be designated by the magistrates' profession and the other by the President after consultation with the magistrates' profession;

(f) Two practising advocates designated by the Minister of Justice after consultation with the advocates' profession;

(g) Two practising attorneys designated by the Minister of Justice after consultation with the attorneys' profession;

(h) One teacher of law designated by the Minister of Justice after consultation with the teachers of law at South African universities;

(i) The Head of Justice College;

(k) Four persons designated by the National Assembly from among its members, at least two of whom must be members of opposition parties represented in the National Assembly;

(l) Four members of the National Council of Provinces designated by the National Council of Provinces by resolution adopted by a majority of at least two thirds of all its members; and

(l) Five fit and proper persons appointed by the President in consultation with the Cabinet, at least two of whom shall not be involved in the administration of justice or the practice of law in the ordinary course of their business.[32]

## IV. INDEPENDENCE OF MAGISTRATES

39. The Special Rapporteur did not receive any complaints about direct interference with the judicial independence of magistrates. However, there were allegations that magistrates, both individually and as an institution, were not perceived to be independent. This perceived lack of independence is quite complex and has to do with at least three issues: their past status under apartheid rule and the supremacy of Parliament; the current arrangements regarding their conditions of service; and their responsibilities for administrative duties. These issues can be summarized as follows:

(a) Magistrates under the apartheid regime, i.e. until 1994, were part of the civil service;

(b) They were recruited from the prosecutorial service and did not require any legal qualification; now the minimum qualification is a university law degree;

(c) Parliament being supreme, they merely applied the law as found in the legislation without question;

(d) Many magistrates appointed during the apartheid regime told the Special Rapporteur that until 1994 they did not know what judicial independence was. One said that the subject was not even taught in the university. The Director of Justice College informed the Special Rapporteur that judicial independence was a new concept for magistrates. Another magistrate said that until 1994 there was no institutional independence for magistrates' courts whatsoever. When asked why magistrates did not call for judicial independence, one answer was "We did not dare open our mouths; we were civil servants". One eminent advocate told the Special Rapporteur that "magistrates have not been brought into the culture of independence [which] counts against them";

(e) There exists a marked division between magistrates and judges, resulting in each being suspicious of the other. Interaction between the two in informal gatherings like joint periodical legal conferences or seminars is non-existent. One senior judge told the Special Rapporteur that there was hardly any informal interaction among judges themselves;

(f) There is no career path for magistrates - once one is appointed as a magistrate one retires as a magistrate; there is no prospect of moving up the hierarchial judicial ladder, however competent;

(g) Since 1993, when the Magistrates Commission was established, magistrates are no longer part of the civil service; however, their terms and conditions of service remain the same as those of civil servants, including the pension scheme;

(h) Inadequate resources is another bone of contention. Over the years the jurisdiction of magistrates' courts has increased considerably, but resources were not increased commensurately: today, 90 per cent of the criminal cases are handled at the level of the magistrates' courts. Compounding this problem, magistrates are called upon to deal with the administrative work of the court. Some chief magistrates are doing purely administrative work;

(i) For some time magistrates have been travelling in the same vehicle with prosecutors to outlying courts, to save public funds on transport. Though this practice has generally been stopped, the Special Rapporteur was informed that it continues in Free State province;

(j) Magistrates are considered competent in criminal law but not in civil cases;

(k) Remuneration of magistrates, as stated earlier, is determined by the Minister of Justice after consultation with the Magistrates Commission;

(l) Appointees to senior positions in the magistracy are not seen to be independent. For such appointments the Minister of Justice is not obliged to accept the recommendations of the Magistrates Commission and indeed the Special Rapporteur was informed that in a few instances the Minister has not done so;

(m) Another source of concern for the magistracy is the disciplinary process and the reprisals allegedly taken against certain magistrates. Fines imposed as a penalty for misconduct are seen as demeaning. In this regard the Special Rapporteur was informed that misconduct by magistrates outside the court, e.g. driving under the influence of alcohol, is a source of concern.

40. In 1996 the Department of Justice started the process of separating the judicial and administrative functions of magistrates. It has not been completed yet as insufficient personnel have been appointed to take over the administrative work. The aim is to appoint court managers who will have functions similar to those of the registrars in the High Courts.

## V. PROPOSED MECHANISM FOR COMPLAINTS AGAINST JUDGES

41. Immediately prior to the mission the Special Rapporteur was informed that, according to media reports in South Africa, certain judges had complained to the Special Rapporteur about the Government's proposal to establish a mechanism to deal with public complaints about the conduct of judges. It was alleged in the reports that the judges viewed such a proposal as interfering with the independence of the judiciary.

42. In fact the Special Rapporteur did not receive complaints from any judges to that effect. The Special Rapporteur made this clear at the press conference held at the beginning of the mission. There was considerable confusion over a document known as the Judicial Matters Amendment Bill which emanated from the Department of Justice. The Special Rapporteur learned that it was not in fact a "bill", but rather a working document prepared by an official in the Department of Justice which was tabled for discussion before the Judicial Service Commission. Soon after the Judicial Service Commission was established, it began to receive complaints about judges. Although the Constitution invests the Commission with functions relating to the impeachment of judges and empowers it to advise the national Government on judicial matters, it has no jurisdiction to deal with complaints about judges falling short of impeachable conduct. However, the Commission received and investigated such complaints in an informal way. That was found to be unsatisfactory and the Commission considered that it should have statutory powers to deal with complaints on a formal basis. The Commission then looked into existing complaints procedures in other countries and came to the conclusion that there was merit in establishing such a procedure in South Africa. A report to this effect was circulated among the heads of all the High Courts, whose views were sought. As there was broad support for such a mechanism, the views of judges generally were then sought. Thereafter, the Commission asked the Minister of Justice to prepare a working document for the Commission's consideration.

43. The working document was prepared in the form of a draft bill. The Commission found the draft unsatisfactory and it was referred back to the Department of Justice for further consideration. A revised draft was prepared by the Department but the Commission, recognizing serious flaws, requested some senior judges to communicate the revised draft to other judges and to present their comments to the Commission. This revised draft provided, inter alia, for fines to be imposed on judges. It was at this point that the document was leaked to the media, with the view being expressed by some judges that it was an attempt by the Government to control the judiciary.

44. Thereafter, a committee of three judges and a retired judge was appointed to consider the revised draft and the comments provided by judges. This Committee prepared a report and also drafted proposed legislation for a complaints mechanism.

45. At about the same time the then Chief Justice, the late Ismail Mahomed, called for senior judges to draft a code of conduct for judges. This was done and, after extensive debate within the judiciary as to its terms, the code, applicable to all judges, was adopted at a meeting of senior judges held at Pretoria on 3 April 2000. It has now been published so as to make known the standards set by the judiciary for the performance of the duties of its members.

46. The Minister of Justice informed the Special Rapporteur that the Government did not and does not have the intention of controlling or interfering with the independence of the judiciary. He emphasized that the Constitution expressly provides for such independence. What the Government was concerned about was accountability.

47. The Minister was reported in the media to have said: "The Government cannot interfere with the courts in the exercise of their judicial functions and does not desire to do so, as they must remain independent".

48. With regard to the proposed complaints mechanism, the only outstanding issue between the Government and the judiciary is the composition of the body to hear the complaints. It is the judges' contention that it should be composed solely of sitting judges. It is the Government's contention that it should have lay representatives, though not necessarily politicians. The majority, however, should be judges.

49. Discussing this very issue with those advocating lay representation, the Special Rapporteur sensed an element of suspicion that leaving the matter entirely to judges would not be acceptable to the society generally. Someone even said that leaving it entirely to the judges meant "leaving it to white judges". Another question posed was Why should there be transparent processes for everyone else but not for judges? On the other hand, judges fail to understand why they cannot be entrusted with investigating and dealing with complaints against their peers when they are entrusted with interpretating the Constitution, determining the constitutionality of legislation and the actions of executive, etc.; they can even review decisions of the Commission or, possibly, the decisions of the proposed mechanism, through judicial review.

## VI. A UNIFIED JUDICIARY

50. The Department of Justice has published, in the form of a White Paper, a proposal for the integration of the higher and lower judiciary. The White Paper does not provide a detailed description as to how the integration will be achieved, or how it will affect remuneration and other conditions of service. There is, consequently, a great deal of misunderstanding about the unification, and to date none of the interested parties has put forward any details on the proposal.

51. The proposal must also be seen as an attempt by the Ministry of Justice to transform the judiciary. While the demographics of South Africa indicate that the overwhelming number of South Africans are either Black, Indian or Coloured, the judiciary is predominantly White.

There are 191 High Court judges in South Africa, of whom 130 are white males, 11 are white women, 41 are black men, and 9 are black women.[33] The majority of them were appointed during the days of apartheid policy and legislation. There are 1,507 magistrates in South Africa. Similarly, most of them were appointed during apartheid rule. Their race and gender are shown in the following table:[34]

**Magistrates in South Africa, by race and gender, at 21 June 2000**

| Classification | White males | White females | Black males | Black females | Total |
|---|---|---|---|---|---|
| Special grade chief magistrate | | | 1 | | 1 |
| Regional court president | 4 | | 3 | 1 | 8 |
| Chief magistrate | 8 | 1 | 11 | 2 | 22 |
| Regional court magistrate | 156 | 25 | 44 | 10 | 235 |
| Senior magistrate | 55 | 7 | 80 | 9 | 151 |
| Magistrate | 429 | 180 | 389 | 92 | 1 090 |
| Total | 652 | 213 | 528 | 114 | 1 507 |

52. The Minister of Justice feels that some judges and magistrates are attempting to hinder the steps towards the transformation of the judiciary.

53. As stated earlier, there is a big divide between judges and magistrates which is characterized by suspicion, mistrust and misunderstanding. Because they hardly interact, the relationship between them is based on subjective perceptions.

54. In discussions during the mission, the Special Rapporteur found that generally magistrates were in favour of integration of the judiciary whereas the judges expressed reservations. The reservations concerned not so much the concept but rather the mode of integration. One judge said that perhaps it was too early, as "magistrates historically were dependent".

## VII. MINIMUM SENTENCING LEGISLATION

55. According to the South African Law Commission, the sentencing system in South Africa faces various problems. There is a perception that like cases are not being treated alike; that judicial officers do not give enough weight to certain serious offences; that imaginative South African restorative alternatives are not being provided to offenders who are being sent to

prison for less serious offences; that sufficient attention is not being paid to the concerns of victims of crime; and that, largely because of unmanageable overcrowding, sentenced prisoners are being released too readily.[35]

56. In addition to requesting the South African Law Commission, in 1996, to investigate all aspects of sentencing, Parliament passed the Criminal Law Amendment Act ("the CLAA") No. 105 of 1997, which came into operation for a two-year period from 1 May 1998. The Act only applies to offences committed on or after 1 May 1998. The President has extended the validity of CLAA for a further year with effect from 1 May 2000.[2]

57. Mandatory minimum sentences were introduced by sections 51 and 52 of CLAA. Schedule 2 to the Act lists the most serious offences - murder, rape and robbery - for which mandatory sentences must be imposed unless "substantial and compelling circumstances" justifying lesser sentences are present.[37] The offences are classified into four categories depending on their seriousness and the circumstances in which they were committed. Among the most serious offences are premeditated murder, the killing of a law enforcement officer in the course of his or her duties, offences committed by a person or group of persons acting in the execution or furtherance of a common purpose or conspiracy, multiple rape or rape by more than one person, rape by a person with the knowledge that he/she has AIDs or is HIV positive. These offences attract a mandatory sentence of life imprisonment.

58. CLAA creates a range of minimum sentences for a long list of other serious offences for which the minimum sentences range from 5 years to 25 years. The sentence imposed will depend on the seriousness and the circumstances of the offence and whether the accused is a first offender or recidivist. The sentences have to be imposed on adult offenders unless "substantial and compelling circumstances exist which justify the imposition of lesser sentences".[38] Because of this provision the sentences are said not to be fully mandatory.[39]

59. Background research conducted by the South African Law Commission has shown that the mandatory minimum sentences introduced by CLAA have resulted in some changes: sentences for some crimes, most prominently rape, are now longer than they were before. However, some difficulties remain with respect to the 1997 Act.

60. Judges, many of whom were opposed to CLAA from its inception, have continued to criticize it for limiting their discretion. Even if this objection can be set aside, judges have difficulties in applying the legislation. Only a limited number of crimes are covered while other serious crimes are not dealt with at all (kidnapping, for example, is not included), thus disturbing the proportionality in the seriousness of various types of crime. Most importantly, judges have interpreted inconsistently the "substantial and compelling circumstances", which have to be present before departure from the prescribed minima is allowed. Where judges have thought that the prescribed sentence would, on balance, be too harsh they have sought to find "substantial and compelling circumstances". In the process they have both incensed the public and are seen to defeat the legislative objective of consistent toughness. In one notorious case a father who raped his young daughter was not given the mandatory minimum sentence for that crime on the ground that he represented no threat to the public at large and that constituted a "substantial and compelling circumstance" justifying a lesser sentence.

61. A key recommendation of the South African Law Commission is the creation of a Sentencing Council which would be responsible for, among other things, limiting sentencing disparities by providing guidance to the courts on sentencing, as well as information on sentencing patterns, the efficacy of various sentences and the capacity of the State to implement such sentences.[40] The establishment of the Sentencing Council and various other changes that are proposed by the South African Law Commission, if accepted by Government, will be combined in a Sentencing Framework Act, for which the South African Law Commission has prepared a draft proposal.[41]

## VIII. ACTING JUDGES

62. Article 175 of the Constitution provides for the appointment of acting judges both to the Constitutional Court and to other courts. With respect to the Constitutional Court, the appointment is made by the President "if there is a vacancy or if a judge is absent", based on the recommendation of the Minister of Justice acting with the concurrence of the President of the Court and the Chief Justice. In the case of other courts the appointment "must be made" by the Minister of Justice after consulting the senior judge of the court where the judge will serve.

63. By their very nature these appointments are temporary and for a short period. The words "or if a judge is absent" in article 145 underscores this temporary element.

64. Further, the procedure for such appointments bypasses the formal procedure provided under article 174 of the Constitution. In effect, it bypasses the Judicial Service Commission process of selection and recommendation.

65. Security of tenure, which is an essential requirement for judicial independence, does not pertain to these appointments.

66. The Special Rapporteur was informed that these appointments can generally be for one to three months, to cover judges who are ill or on leave. The Special Rapporteur learned that more and more judges are appointed as acting judges. There is no longer any rule. Two judges were appointed for two years. The Special Rapporteur was told of one case where an acting judge continued uninterrupted for five years. At the end of 1999, in the Transvaal division of the High Court, there were 10 acting judges. The Special Rapporteur was also told that acting appointments are welcome in the transformation process as they act as a form of "short probation".

67. There is no restriction on the kind of cases or appeals acting judges can hear.

68. The Special Rapporteur was told of an incident in which an acting judge told a senior judge that he (the acting judge) knew that if he appeared before the Judicial Service Commission for an interview for a full-time appointment, he would be asked why he had made a particular decision in a case with a political dimension.

69. The Minister of Justice informed the Special Rapporteur that he had not appointed any acting judges for more than six months. In one case the appointment was extended twice, as no permanent appointment had been made.

## IX. THE POSITION OF PUBLIC PROSECUTORS

70. The Special Rapporteur did not receive any complaints about the operational independence of public prosecutors. The National Prosecuting Authority Act has created an independent institution of public prosecutors, which sets them apart from civil servants. Unfortunately, their conditions of service are still based on old service regulations, including their salary schemes.

71. Section 179 of the Constitution provides for a single independent national prosecuting authority for South Africa. Though there have been frictions between the Authority and the Department of Justice, the latter has recognized the operational independence of prosecutors. The low levels of competence and high turnover among prosecutors have been a source of concern for the Department of Justice, as they contribute to delays in trials.

## X. AN INTEGRATED LEGAL PROFESSION

72. As stated above, the policy of apartheid affected all aspects of life. It had a dramatic impact on the legal profession. Although the overwhelming majority of South Africans are Black, only a minority of legal professionals are Black. This imbalance obviously impacts on the perceptions the general populace has about legal professionals, as well as on their legitimacy.

73. South Africa currently has a split bar: advocates who are briefed by attorneys and who only appear in the High Courts and other superior courts; and attorneys who are briefed by clients and who primarily appear in magistrates' courts only. The split bar is seen as one of the vestiges of the past. There are two concerns about it. Firstly, it is perceived as one of the barriers to access to justice. Briefing both an attorney and an advocate for a High Court matter generally is prohibitively expensive, thereby denying the majority of South Africans, who are poor, the possibility of litigating in the High Court forum. Secondly, it is perceived as a barrier to law graduates from (previously) disadvantaged backgrounds developing High Court practices.

74. During 1999, the Policy Unit of the Department of Justice prepared and circulated a discussion paper entitled "Transformation of the Legal Profession". In the main, the document focused on: the need to rationalize requirements for admission to legal practice; the need to rationalize regulation of the practice of law; the need to make the legal profession more representative and the need to improve the public's access to the legal profession. The circulation of the discussion paper was followed by a two-day National Consultative Forum on Legal Practice, hosted by the Department of Justice in November 1999. Responses to the discussion paper indicated that most accepted the need to make the legal profession more representative and the need to improve the public's access to the legal profession. The agenda for the Forum accordingly focused on the qualifications required for admission to practice and the regulation of the legal profession.[42] Consensus was reached on two issues. First, that there should be a single Act to regulate all legal practitioners, that is advocates, attorneys, legal advisers or corporate lawyers, conveyancers, notaries and paralegals. Second, that there should be a single statutory regulating authority for all legal and paralegal practitioners. It is envisaged that this regulatory body will not replace the voluntary associations currently representing the interests of various groupings within the legal profession. Such arrangements will be in line with the constitutional guarantee of freedom of association. It is envisaged that the statute which will

establish the regulatory authority will require all legal and paralegal practitioners to register with, and be subject to, the regulatory authority. Section 22 of the Constitution provides that the practice of a profession may be regulated by law.

75. The Department of Justice is responsible for drafting the legislation which will regulate legal practice in the future. Draft legislation has not been presented to Parliament.

## XI. LEGAL AID AND ACCESS TO JUSTICE

76. Legal aid to the indigent is provided by the Legal Aid Board, which was established under the Legal Aid Act No. 22 of 1969; it also carries out the State's obligation to ensure that the constitutional rights of accused in criminal cases are met.

77. The Special Rapporteur was informed that the provision of legal aid and the general access to justice by the poor are in crisis. The crisis has been created by a number of factors: the rates paid to lawyers to provide legal services rose over a number of years to unsustainable levels; the database of available lawyers was unreliable; the last decade saw a growth in new cases from 24,281 in 1989/1990 to 148,519 in 1999/2000; a lack of accounting integrity and proper management; and incompetence on the part of some lawyers appearing on legal aid briefs. To address the crisis, the Legal Aid Board has reduced the daily tariff paid to lawyers in private practice; it has upgraded its information technology systems; and it has agreed to the creation of five executive posts which will constitute a senior management team, responsible for implementing the Business Plan presented to Parliament on 17 May 2000. A key element in the Business Plan is the drastic scaling down of legal aid and, in its place, the establishment of justice centres which will deliver legal services, both criminal and civil, through salaried employees of the Legal Aid Board, to a wide range of vulnerable groups.

78. However, the crisis has not disappeared. Many lawyers in private practice have refused to continue with legal aid instructions under the reduced tariff and/or are unwilling to accept new instructions at this tariff. Whilst the Government has agreed to the hiring of qualified and competent financial, legal and information technology managers to lead the body, a meeting between representatives of the Ministries of Finance, Justice and Public Service was unable to reach agreement on granting approval for the Legal Aid Board to go ahead with hiring these managers at salary scales outside of the strictures of the civil service.[43] Further, an urgent request for the approval of posts to enable the establishment of justice centres was submitted to the Ministers of Finance and Justice. Except for 10 posts for one justice centre, such approval has not been forthcoming.[44]

## XII. JUDICIAL TRAINING AND CONTINUED LEGAL EDUCATION

79. A centralized judicial training programme is provided by Justice College. In its progress report for the year 1998/99, it was reported that the college had conducted training for 2,924 officials including 938 magistrates and 450 prosecutors during that year. Emphasis is now given to programmes on the fundamental principle of judicial independence.

80. In the course of discussions the Special Rapporteur determined that magistrates are more receptive to training programmes than judges. Many judges view continued legal education programmes with suspicion. It was said that judges do not like the word "training" but they were comfortable with "seminars" or "workshops" or "conferences" organized by themselves. Any Government-sponsored programme is resisted on the grounds that it would undermine their independence. Many judges also resent outside trainers who are not judges. The Judicial Service Commission has a training committee.

## XIII. CONCLUSIONS

81. There is no doubt that South Africa is currently going through a phase of massive transformation as mandated in the preamble to the Constitution. A country devastated by the most heinous injustices of the past is attempting to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights".

82. In this process the justice system will inevitably be the focus of attention. The Constitution expressly provides for an independent judiciary, which includes the lower courts and the superior courts. Transforming the mindsets of judges, magistrates, lawyers and prosecutors who, until 1994, functioned under a regime of parliamentary supremacy to accept the supremacy of the Constitution is no small task.

83. All have agreed to this transformation to a new constitutional order. The implementation process appears to have brought about tensions, misunderstandings and suspicions amongst the various actors. The Government wants the process expedited but some judges and magistrates are seen to be stalling under the guise of resisting Government encroachment on judicial independence.

84. Magistrates are not perceived to be independent, though there is no evidence of any interference in their adjudicative processes. It is a well-settled and trite principle that any judiciary worthy of being acknowledged as independent must be perceived to be independent. Where 90 per cent of criminal cases are handled by magistrates, it is imperative that this principle of perceived independence is addressed and established.

85. Whatever may have been their shortcomings in the past, magistrates should not be looked down upon but instead brought into the mainstream of an independent South African judiciary. In this regard, a recent landmark judgement of the Supreme Court of Bangladesh is worthy of note: the Supreme Court directed that the lower judiciary be completely separated from the executive branch of Government.[45]

86. Accountability and transparency are the very essence of democracy. Not a single public institution or, for that matter, private institution dealing with the public is exempt from accountability. Hence the judicial branch of Government too is accountable.

87. However, judicial accountability is not the same as the accountability of the executive or legislative branches of Government. This is because of the independence and impartiality expected of the judicial branch. Judicial officers are accountable to the extent that they decide the cases before them expeditiously in public (unless there are special reasons for doing

otherwise) and fairly, and delivering their judgements promptly and giving their reasons; their judgements are subject to scrutiny by the appellate courts. Legal scholars and even the lay public, including the media, may comment on the judgement. If judicial officers engage in misconduct, they are subject to discipline according to the mechanism provided by law. They should not be accountable for their judgements to anyone.

88. The Special Rapporteur refers to principles 17-20 of the United Nations Basic Principles on the Independence of the Judiciary and guideline 6 of the Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence.

89. In this regard the Special Rapporteur regrets the finding of the Truth and Reconciliation Commission on the failure of the judges to appear before the Commission when requested to do so. Though the Commission was unique, to call upon the judges to account before that institution would have set a precedent for the future, not only in South Africa but in other parts of the world as well. A situation, however well intentioned and motivated and however unique, could be used as a precedent in a less unique situation. The Special Rapporteur considers that the judges were quite justified in declining to appear before the Commission.

90. The Special Rapporteur welcomes the initiative of the Judicial Service Commission in collaborating with the judges to draft legislation for the establishment of a mechanism to deal with complaints against judges. Though the Government has been expressing its concerns and seeking greater judicial accountability, the initiative for this mechanism in actual fact came from the Commission and the judges themselves. The Special Rapporteur commends the judges for this bold measure. The need for such a mechanism has been mooted by other jurisdictions, particularly for categories of complaints of behaviour falling short of impeachable conduct. The implementation of this mechanism will be carefully watched by other jurisdictions to be used as a model.

91. The Special Rapporteur also welcomes the general agreement that there will be no punitive measures such as fines imposed on judges.

92. With regard to the composition of the mechanism, though the Government's contention that a minority should be laypersons other than politicians has substance, there is equally merit to the contention that the mechanism should be composed of judges themselves, like in other common law countries. Though self-discipline has come under criticism in the face of the need for greater transparency and accountability, in South Africa's transformation process a step-by-step approach should be tried. At least for an initial period of seven years the mechanism should be composed entirely of senior judges. There may not be objections to including retired judges. If, after that period, this is found not to be satisfactory, the composition could be reviewed.

93. Media attacks on the judiciary and judge-bashing by the press are not uncommon in some countries. In a country respectful of the constitutional right of free speech and where the judiciary does not invoke the power of citing contempt for scandalizing the courts, the media should be more appreciative of the role of the judiciary and exercise restraint in its reports. Any criticism of judgements or the conduct of judges should be couched in temperate language so

that public confidence in the courts is not undermined. The right to an independent judiciary and the right to free speech are fundamental human rights and should be evenly balanced. However, it must be borne in mind that an independent judiciary is a prerequisite for the protection of free speech. Therefore, it is in the interest of the media to see that judicial independence and confidence in the institution are preserved and not undermined.

94. Judges too must be circumspect in what they say in court. The constitutional role of judges is to adjudicate fairly and deliver judgements in accordance with the law and the evidence presented. It is not their role to make disparaging remarks about parties and witnesses appearing before them, or to cast aspersions on those not involved in the proceedings. When judges resort to such conduct, they lose their judicial decorum. They invite public criticism and bring disrepute to the institution.

95. The Special Rapporteur also welcomes the initiative of the late Chief Justice Ismail Mahomed for the production and publication of a code of judicial ethics for judges. This is yet another step in the right direction towards securing greater accountability.

96. The proposal for a unified judiciary as part of the transformation process needs careful and in-depth study. The Special Rapporteur regrets the negative attitude of some judges to this exercise on the grounds that magistrates do not have a culture of independence. The judges have an important role to play in seeing that the magistrates, who form part of the South African judiciary and deal with 90 per cent of the criminal cases, are integrated into the culture of judicial independence. The present divide between judges and magistrates is not healthy in a democracy in transition. Judges should not be seen or heard opposing this process.

97. The minimum sentencing legislation in South Africa is not as regimented as that found in other jurisdictions. The exceptions provided in CLAA for imposing lesser sentences in "substantial and compelling circumstances" take away the stink of legislative sentencing with judges and magistrates seen as rubber stamps of the legislature. Nevertheless, such legislation does impinge upon international standards of judicial independence. It is beyond dispute that sentencing in a criminal trial is part of the judicial process of the trial. Such legislation may offend the fair trial procedures in article 14 of the International Covenant on Civil and Political Rights and principle 3 of the United Nations Basic Principles on the Independence of the Judiciary.

98. Societal concerns about the high incidence of crime are relevant and the Government needs to address this issue. Rather than having an outside body setting guidelines for courts, it may be more appropriate for the apex court, in this case the Supreme Court, from time to time to deliver guideline judgements to assist lower courts in sentencing. Similar practices are now being undertaken in the United Kingdom and are now followed in New South Wales, Australia. The virtue of guideline judgements is that sentencing policy is retained within the domain of the judiciary. Reasonable consistency in sentences could be achieved and the independence of the judiciary is not impinged upon.

99. One of the essential elements of judicial independence is security of tenure. This is expressly provided for in principle 12 of the Basic Principles on the Independence of the Judiciary. It is this element which determines, inter alia, whether a tribunal is independent or not.

100. Hence the appointment of acting judges under section 175 of the Constitution and allowing them to remain on the same appointment for periods beyond the purpose envisaged by the Constitution could adversely affect the independent character of the tribunal which is presided by the acting judge. Challenges could be taken to determine whether the tribunal is constitutionally independent, as happened in late 1999 in Scotland when the High Court of the Judiciary found that temporary sheriffs appointed on one-year contracts did not have the requisite security of tenure to ensure the independence of the courts they presided over.[46] Also, in 1997 the Supreme Court of Norway came to a similar conclusion in the case of a temporary judge awaiting permanent appointment.[47] In 1995 the Supreme Court of Pakistan struck down as unconstitutional the appointment of ad hoc judges to fill vacancies for permanent appointments in the Supreme Court.[48] The fact that these appointments are a form of "short probation" makes it more obvious that they do not have the requisite security of tenure. Recently the European Union, in a report on Slovakia, expressed concern over a provision in the Slovakian Constitution for the appointment of judges initially for a four-year term before they are confirmed, even though during the four years they could not be removed except under the constitutional process for the removal of judges.[49]

101. The preamble to the Guidelines on the Role of Prosecutors acknowledges, inter alia, that prosecutors play a crucial role in the administration of justice. It is essential to ensure that prosecutors possess the requisite professional qualifications to exercise their functions impartially in criminal proceedings. They also require an element of independence in exercising discretion on whether to prosecute. Prosecutors therefore need to perceive themselves and to be perceived as not being part of the civil service. Though in South Africa prosecutors are separate from the civil service, their service conditions are the same as those of the civil service, which is a bone of contention. A separate legal service commission to deal with the service conditions of prosecutors may be appropriate.

102. The Special Rapporteur welcomes the move towards an integrated legal profession.

103. With regard to legal aid, the Special Rapporteur expresses his deep regret that many lawyers refused to provide legal aid services when the legal aid fees were reduced. This does not speak well for the legal profession. The Special Rapporteur was alarmed that initially the fees were as high as in the United Kingdom. It was said that the lawyers "fleeced" the system. When the fees had to be reduced, they fled. The provision of legal aid for the poor must be one of the objectives of every bar association. Lawyers must be sensitized to this objective.

104. The attitude of some judges to continued legal education is a matter of concern. Appointment to the high office of judge does not mean that he or she does not require any further education to keep him or her abreast of the latest developments in the law and procedure, particularly developments in other jurisdictions. To resist or resent such programmes on the grounds that it would impinge on the independence of the judiciary should not be accepted. In

some jurisdictions such as the United States, such programmes are compulsory. Judicial skill and competency will only enhance public confidence in the independence of the judiciary. Judges should welcome the involvement of non-judges in such programmes on subjects where expertise is not readily available within the judiciary.

105. The Special Rapporteur generally welcomes the openness and transparency of the Government in calling for dialogue with the relevant actors on its proposal for reforms.

## XIV. RECOMMENDATIONS

106. With regard to the independence of magistrates:

(a) Appropriate measures to change the general perception of the lack of independence of magistrates will have to be adopted in the context of the proposal for a unified judiciary. The Government's current thinking as regards merging the Judicial Service Commission with the Magistrates Commission is also part of the same context. Therefore, appropriate and constructive steps must be taken to address this proposal without delay;

(b) A committee composed of representatives of all actors in the administration of justice should be formed, with clear terms of reference, to address the proposal for unification. The committee should include representatives of magistrates, judges, prosecutors, lawyers and academia, as well as the Department of Justice;

(c) Judges who have been heard opposing the proposal must concede in the interest of the transformation of the constitutional order;

(d) In the interim, measures must be taken to facilitate interaction between judges and magistrates on an informal level. The bar associations could encourage this by organizing periodic law conferences and seminars where judges, magistrates and lawyers are invited to participate. There should be no objection to participation by the Department of Justice and prosecutors. Their presence and participation will not in any way impinge on the independence of the judiciary. This is the surest way of fostering fraternities and removing suspicions of one another.

107. With regard to the proposed complaints mechanism: the composition of this mechanism should be left entirely to the judges, and if necessary retired judges could be included. Judges, who took the initiative to draft legislation for such a mechanism, should be entrusted to self-regulate the mechanism for an initial period of at least seven years. Thereafter the effectiveness of the mechanism could be reviewed.

108. With regard to minimum sentencing legislation: guideline judgements from the Supreme Court of Appeal should be encouraged. Experiences in the United Kingdom and recently in New South Wales, Australia, could be studied.

109. With regard to acting judges: the Judicial Service Commission, which is, inter alia, empowered to advise the Government on judicial matters, should review these acting

appointments and determine whether they are consistent with the spirit of section 175 of the Constitution and whether such acting judges could be perceived as independent in the light of international standards and judgements of courts from other jurisdictions.

110. With regard to the position of public prosecutors:

(a) Their terms and conditions of service should be reviewed and the desirability of a separate independent legal service commission to deal with all matters relating to their service should be considered;

(b) The Office of the United Nations High Commissioner on Human Rights, through its office in Johannesburg, should liase with Justice College to identify areas for joint training programmes to improve the skills and competence of the prosecutors.

111. With regard to legal aid: the bar associations must initiate programmes to sensitize their members to their role and the need for commitment to assist in legal aid programmes without regard to fees. Lawyers should be encouraged to undertake at least a minimum number of free legal aid cases a year as their contribution to this noble social cause in a country where poverty is still a hindrance to access to justice. This moral duty should be inculcated in teaching programmes for law students at university level.

112. With regard to judicial training and continued legal education:

(a) The Government should provide more resources, particularly financial resources, to Justice College to improve its training programmes;

(b) Continued legal education programmes for both magistrates and judges should be made compulsory;

(c) Judges should not resist or resent such programmes.

## Notes

[1] Truth and Reconciliation Commission of South Africa Report, Volume Four, South Africa, Juta & Co. Ltd., October 1998, pp. 94-95.

[2] "'Crude' attacks undermine justice", *Weekly Mail & Guardian*, 26 May - 1 June 2000.

[3] Constitution of the Republic of South Africa, Act No. 108 of 1996 ("the Constitution"), sect. 165 (1).

[4] Ibid., sect. 166.

[5] Ibid., sect. 167 (a) and (b).

[6] Ibid., sect. 174 (4).

[7] Ibid., sect. 174 (3).

[8] Ibid., sect.168 (3)

[9] Ibid., sect. 168 (1) and of the Supreme Court Act No. 59 of 1959, sect. 3 (1).

[10] Constitution, sect. 174 (3).

[11] Ibid.. sect. 174 (6).

[12] The provincial and local divisions of the High Court and their respective seats are as follows: Cape of Good Hope Provincial Division: Cape Town; Easter Cape Division: Grahamstown; Northern Cape Division: Kimberley; Natal Provincial Division: Pietermaritzburg; Orange Free State Provincial Division: Bloemfontein; Transvaal Provincial Division: Pretoria; Durban and Coast Local Division: Durban; Witwatersrand Local Division: Johannesburg; and South Eastern Cape Local Division: Port Elizabeth (First Schedule to the Supreme Court Act No. 59 of 1959).

[13] Supreme Court Act No. 59 of 1959, sect. 3 (2).

[14] Constitution, sect. 174 (6).

[15] Ibid., sect. 174 (1) and Supreme Court Act, sect. 10 (1).

[16] Constitution. sect. 175 (2).

[17] The Judges' Remuneration and Conditions of Employment Act No. 88 of 1989.

[18] This information was obtained in writing from Ms. Shelly Gale Stoltz of the Department of Justice on 20 June 2000. The figures were valid as at that date.

[19] Personal interview with Mr. Hans Meyer, Magistrates Commission, on 21 June 2000.

[20] Magistrates' Court Act No. 32 of 1944, sect. 89 (1).

[21] Ibid., sect. 89 (2).

[22] Ibid., sect. 91 (1) (a) and (b).

[23] Ibid.

[24] Constitution, sect. 170.

[25] South African Law Commission, Summary of Recommendations, Report on Constitutional Jurisdiction of the Magistrates' Courts, Project 111, November 1999, p. 2.

[26] Magistrates Act No. 90 of 1993, sect. 10.

[27] Ibid., sect. 12.

[28] This information was obtained in writing from Ms. Shelly Gale Stoltz of the Department of Justice on 20 June 2000. The figures were valid as at that date.

[29] Magistrates Act No. 90 of 1993, sects. 11 and 16.

[30] Constitution, sect. 178 (1).

[31] Ibid., sect. 178 (5).

[32] Magistrates Act No. 90 of 1993, sect. 3 (1) (a).

[33] This information was obtained telephonically from Ms. Stefanie Venter of the Department of Justice on 21 June 2000. The figures were valid as at that date.

[34] This information was obtained telephonically from Ms. Kobie Erasmus of the Department of Justice on 21 June 2000. The figures were valid as at that date.

[35] South African Law Commission, Discussion Paper 91, Sentencing: A New Sentencing Framework, March 1999, executive summary, p. xix.

[36] Proclamation No. R.23, Government Gazette, vol. 418, No. 21122, 28 April 2000.

[37] South African Law Commission, Discussion Paper 91, op. cit., p. 5.

[38] Criminal Law Amendment Act No. 105 of 1997, sect. 51 (3) (a).

[39] D. van Zyl Smit, Sentencing and punishment in Constitutional Law of South Africa, M. Chaskalson et al., South Africa, Juta & Co. Ltd., 1996, pp. 28-29.

[40] South African Law Commission, Discussion Paper 91, op. cit., executive summary, pp. xxi-xxii.

[41] Ibid., p. xxiv.

[42] National Consultative Forum on Legal Practice, article by Professor Cheryl Loots, 6 December 1999, available on the Website of the South African Department of Justice at www.doj.gov.za/docs/info/transform/loots.html.

[43] Business Day, 20 July 2000.

[44] Legal Aid Board Business Plan, presented to Parliament on 17 May 2000, pp. 14-15.

[45] Secretary, Ministry of Finance and others v. Md. Masdan Hossain and Others, Supreme Court of Bangladesh Civil Appeal No. 79/99 (judgement delivered on 2 December 1999).

[46] Starrs and Anor v. Procurator Fiscal (Linlithgow), reported in The Times, 17 November 1999.

[47] Jens Viktor Plabte v. The State (Supreme Court of Norway judgement delivered on 19 December 1997).

[48] Jehad Trust v. Federation of Pakistan, Pakistan Legal Decisions, 1996, SC 324.

[49] 2000 Regular Report from the Commission on Slovakia's Progress Towards Accession, 8 November 2000, p. 16.

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